

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs September 20, 2006

**WILLIAM W. OSEPCZUK v. RICKY J. BELL, WARDEN**

**Direct Appeal from the Criminal Court for Davidson County  
No. 05C-2333 Thomas Brothers, Judge**

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**No. M2006-00131-CCA-R3-HC - Filed January 8, 2007**

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Petitioner, William W. Osepczuk, appeals the trial court's dismissal of his *pro se* petition for writ of habeas corpus. After a thorough review of the parties' briefs and applicable law, the judgment of the trial court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JOHN EVERETT WILLIAMS, JJ., joined.

William W. Osepczuk, Nashville, Tennessee, *pro se*.

Robert E. Cooper, Jr., Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General, and Victor S. (Torry) Johnson III, District Attorney General, for the appellee, the State of Tennessee.

**OPINION**

In August of 1999, Petitioner was convicted of criminal attempt to commit first degree murder and sentenced as a Range I offender to serve twenty-five years in the Department of Correction. This Court affirmed that conviction on direct appeal, and Petitioner was denied post-conviction relief. *State v. William "Butch" Osepczuk*, No. M1999-00846-CCA-R3-CD, 2001 WL 120716 (Tenn. Crim. App., at Nashville, Feb. 1, 2001), *perm. app. denied* (Tenn. June 18, 2001); *William Osepczuk v. State*, M2003-01601-CCA-R3-PC, 2004 WL 1413966 (Tenn. Crim. App., at Nashville, June 22, 2004), *perm. app. denied* (Tenn. Dec. 6, 2004). On Aug 5, 2005, Petitioner filed a *pro se* petition for writ of habeas corpus which the trial court subsequently denied. In its order denying the petition, the trial court found that Petitioner's claim was based primarily on his interpretation of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), "[w]hich [Petitioner] contends renders the Sentencing Reform Act of 1989 unconstitutional as applied to him." The trial court noted that the Tennessee Supreme Court had previously addressed the constitutionality of the act in *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005), and that decision "provided in no uncertain terms that the Sentencing Reform Act of 1989 was not unconstitutional."

Petitioner now appeals the trial court's denial of his writ of habeas corpus arguing that (1) Tennessee's Sentencing Reform Act of 1989 is unconstitutional and void because it violates the provisions of Article I, Section 6 of the Tennessee Constitution and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; (2) he was denied his statutory right under Tennessee Code Annotated section 40-35-210(b)(6) to give a statement to the trial court on his own behalf prior to sentencing (which Petitioner refers to as his right to "allocution"); (3) he was denied his constitutional right to have the jury instructed regarding all lesser included offenses of the charge of attempt to commit first degree murder; and (4) he was denied his constitutional right to effective assistance of counsel.

Article I, section 15 of the Tennessee Constitution guarantees the right to seek habeas corpus relief and Tennessee Code Annotated sections 29-21-101 *et seq.* codify the applicable procedures for seeking a writ. However, the grounds upon which a writ of habeas corpus may be issued are very narrow. *McLaney v. Bell*, 59 S.W.3d 90, 92 (Tenn. 2001). A writ of habeas corpus is available only when it appears on the face of the judgment or the record of the proceedings upon which the judgment was rendered that a court was without jurisdiction to convict or sentence the defendant or that the defendant is still imprisoned despite the expiration of his sentence. *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993); *Potts v. State*, 833 S.W.2d 60, 62 (Tenn. 1992). The purpose of a habeas corpus petition is to contest void and not merely voidable judgments. *Archer*, 851 S.W.2d at 163. A void judgment is a facially invalid judgment, clearly showing that a court did not have statutory authority to render such judgment; whereas, a voidable judgment is facially valid, requiring proof beyond the face of the record or judgment to establish its invalidity. *See Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999). The burden is on the petitioner to establish, by a preponderance of the evidence, "that the sentence is void or that the confinement is illegal." *Wyatt v. State*, 24 S.W.3d 319, 322 (Tenn. 2000). Moreover, it is permissible for a court to summarily dismiss a petition for habeas corpus relief, without the appointment of counsel and without an evidentiary hearing, if the petitioner does not state a cognizable claim. *See Hickman v. State*, 153 S.W.3d 16, 20 (Tenn. 2004).

Citing *Blakely v. Washington*, Petitioner first argues that his rights under the Sixth Amendment to the United States Constitution and article I, section 6 of the Tennessee Constitution were violated when the trial judge enhanced his sentence from the minimum fifteen years to the maximum twenty-five years for his conviction without submitting the enhancement factors or the proposed sentence to a jury. 545 U.S. 296, 124 S. Ct. 2531. He asserts that the trial judge relied on a single enhancement factor, Petitioner's one prior criminal conviction, to enhance his sentence and argues that the judge was not justified in enhancing his sentence from fifteen to twenty-five years based solely on one enhancement factor. More specifically, he argues that Tennessee's Sentencing Act is unconstitutional because it violates a defendant's right to a jury trial by allowing a trial court to consider extraneous matters not submitted to a jury for purposes of enhancing a defendant's sentence. He contends that, notwithstanding prior decisions of this Court and our supreme court, *Blakely* renders our sentencing act unconstitutional and that decision should be applied retroactively to his case with the result of reducing his sentence.

We agree with the trial court that the grounds alleged by Petitioner do not entitle him to habeas corpus relief. Despite Petitioner's arguments to the contrary, the Tennessee Supreme Court determined that the *Blakely* decision did not announce a new rule of law, did not impact the validity of our statutory sentencing structure, and is not subject to retroactive application. *State v. Gomez*, 163 S.W.3d 632, 658-62 (Tenn. 2005). As noted by the trial court, the Tennessee Supreme Court held that *Blakely* does not apply to Tennessee's sentencing scheme because our sentencing act does not violate the Sixth Amendment right to a jury trial. *State v. Gomez*, 163 S.W.3d at 651, n. 16. Specifically, the court stated that Tennessee's sentencing act "authorizes a discretionary, non-mandatory sentencing procedure and requires trial judges to consider the principles of sentencing and to engage in a qualitative analysis of enhancement and mitigating factors . . . all of which serve to guide trial judges in exercising their discretion to select an appropriate sentence within the range set by the Legislature." *Id.* at 661.

Criminal attempt to commit first degree murder is a Class A felony. T.C.A. § 39-11-117(a)(2) (2003). The authorized term of imprisonment for a Class A felony is "not less than fifteen (15) nor more than sixty (60) years." T.C.A. § 40-35-111(b)(1) (2003). The presumptive sentence for a Range I offender convicted of a Class A felony is at the mid-point in the range, specifically "not less than fifteen (15) no more than twenty-five (25) years." T.C.A. § 40-35-112(a)(1) (2003). As previously stated, Petitioner was sentenced as a Range I offender and ordered to serve twenty-five years in the Department of Correction for his conviction of criminal attempt to commit first degree murder. Accordingly, under *Gomez*, the trial judge, applying only one enhancement factor, properly sentenced Petitioner to serve twenty-five years in the Department of Correction, and that sentence was not in violation of *Blakely*. *State v. Gomez*, 163 S.W.3d at 661. Because Petitioner has failed to demonstrate that his conviction or sentence is void, habeas corpus relief is not available on this issue.

Petitioner makes several other claims that his constitutional rights were allegedly violated during his trial proceedings. Specifically Petitioner contends that he was denied his statutory right to give a statement to the trial court on his own behalf at the sentencing hearing; that he was denied his constitutional right to have the jury instructed regarding all lesser included offenses of the charge of attempt to commit first degree murder; and that he was denied his constitutional right to effective assistance of counsel. These claims, like his sentencing claim, are likewise without merit. There is nothing in the record to support Petitioner's claim that he was denied an opportunity to speak on his own behalf prior to sentencing. In any event, this is not a recognized claim for habeas corpus relief. With respect to his allegations that he received ineffective assistance of counsel, and that the jury was not instructed as to lesser included offenses, these claims were previously resolved through Petitioner's petition for post-conviction relief. *William Osepczuk v. State*, M2003-01601-CCA-R3-PC, 2004 WL 1413966 (Tenn. Crim. App., at Nashville, June 22, 2004), *perm. app. denied* (Tenn. Dec. 6, 2004). Petitioner cannot now attempt to raise the issues again by forging a collateral attack through a petition for habeas corpus. Even assuming arguendo, that Petitioner's constitutional rights were violated, we have previously held that "constitutional infirmities create voidable judgments not void judgments unless the face of the record establishes that the trial court did not have jurisdiction to convict or sentence the petitioner." *Wayford Demonbreun, Jr. v. State*, No. M2004-03037-CCA-

R3-HC, 2005 WL 1541873, at \*1 (Tenn. Crim. App., at Nashville, June 30, 2005), *perm. app. denied* (Tenn. Oct. 31, 2005)(citing *Luttrell v. State*, 644 S.W.2d 408, 409 (Tenn. Crim. App. 1982)); *Earl David Crawford v. State*, No. M2004-02440-CCA-R3-HC, 2005 WL 354106, at \*1 (Tenn. Crim. App., at Nashville, Feb. 15, 2005), *perm. app. denied* (Tenn. June 27, 2005). Having already established that Petitioner has failed to show that his sentence is void or that his confinement is illegal, we conclude that Petitioner has failed to state a cognizable claim for habeas corpus relief, and that the trial court properly dismissed his petition. *See Passerella v. State*, 891 S.W.2d 619, 627-28 (Tenn. 1994).

### **CONCLUSION**

For the foregoing reasons, the judgment of the trial court is affirmed.

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THOMAS T. WOODALL, JUDGE